

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Dkt No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
)	

**Reply to Opposition to the Petition for Reconsideration
of the Office of Advocacy, U.S. Small Business Administration**

The Office of Advocacy (“Advocacy”) of the U.S. Small Business Administration (“SBA”) respectfully submits this reply to Mr. Walter Oney’s Opposition (“Opposition”)¹ to the Petition for Reconsideration filed by Advocacy (“Petition”) requesting that the Federal Communications Commission (“FCC” or “Commission”) modify its recent decision to regulate unsolicited commercial fax communications (“Fax Advertising Provisions”) in the above-captioned proceeding.² The Office of Advocacy is an independent office within the SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

Mr. Oney has filed an opposition on the grounds that Advocacy’s Petition: (1) does not reflect the needs and desires of small businesses, (2) overstates the burden of compliance with the rule, and (3) favors fax advertisers over small businesses. Advocacy disagrees with these

¹ *Opposition to Petition for Reconsideration filed by the Office of Advocacy, U.S. Small Business Administration* filed by Walter Oney in CG 02-278 (Sept. 5, 2003) [hereinafter Opposition].

² *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, CG Dkt. No. 02-278, FCC 03-153 (rel. July 3, 2003).

assertions and believes that the Opposition has misinterpreted Advocacy's Petition. Advocacy is responding to re-iterate its statutory authority, describe its outreach to and representation of small entities, including small businesses, and further clarify its position on the Fax Advertisement Provisions.

As stated in our Petition, Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305³ to represent the views and interests of small business within the Federal government. Advocacy's statutory duties include serving as a focal point for the receipt of complaints concerning the government's policies as they affect small business, developing proposals for changes in Federal agencies' policies, and communicating these proposals to the agencies.⁴ Advocacy also has a statutory duty to monitor agencies' compliance with the Regulatory Flexibility Act ("RFA"), which requires agencies, including the FCC, to identify the economic impact of its regulations on small entities and to consider less burdensome alternatives.⁵ The discussion of Advocacy's statutory authority in the Opposition is mistakenly focused on Advocacy's outreach responsibilities under Section 609(b) of the RFA. While Advocacy regularly engages in extensive outreach, the requirements of Section 609(b) solely pertain to Advocacy's participation in a small entity review panel for certain rules from the Environmental Protection Agency and the Occupational Safety and Health Administration.

To fulfill its statutory duty to represent the interests of small businesses and to improve agency compliance with the RFA, Advocacy performs extensive outreach to small entities, including small businesses, small organizations, and small governmental jurisdictions, and their representatives. Advocacy takes its direction from small entities and their representatives in

³ Codified as amended at 15 U.S.C. §§ 634(a)-(g), 637.

⁴ 15 U.S.C. § 634(c)(1)-(4) (1996).

⁵ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.) amended by Subtitle II of the

Washington, D.C. and across the country to determine which rulemakings are priorities for Advocacy's involvement. Advocacy often works with trade associations that represent small businesses, and our Regional Advocates meet regularly with small businesses and local organizations all across the country. In addition, Advocacy commonly holds roundtables to receive input from small entities on the economic impact of agency rules. In this rule in particular, numerous small businesses and small business trade associations, some of which are themselves small organizations affected by the FCC rule, contacted Advocacy to express concerns regarding the impact of the Fax Advertising Provisions. As part of its outreach on the Fax Advertising Provisions, Advocacy spoke with the U.S. Chamber of Commerce, National Federation of Independent Business, American Business Media, American Teleservices Association, American Society of Association Executives, National Automobile Builders Association, National Association of Realtors, Air Conditioning Contractors of America, National Small Business Association, National Association of Wholesaler-Distributors, American Society of Travel Agents, National Association of Business Political Action Committees, and several other small businesses, such as International Business Forum Conferences and the Alpha-Omega Change Engineering, LLC. Advocacy also distributed its letter in support for the request for stay on this rule and its Petition to the over 16,000 subscribers to Advocacy's Web-based regulatory listserv.

The Opposition takes issue with Advocacy's statements that the Commission did not consider small business impacts.⁶ Advocacy's assessment is based on the FCC's failure to

Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996).

⁶ Opposition at 2.

comply with the requirements of the RFA.⁷ The FCC's final regulatory flexibility analysis ("FRFA") did not contain an adequate analysis of the compliance costs of Fax Advertising Provisions, nor did include a discussion of alternatives considered by the FCC to minimize the economic impact of the Fax Advertising Provisions on small businesses and membership organizations. The sections of the Order cited by the Opposition do not contain an analysis of the compliance costs or a discussion of less burdensome alternatives as required by the RFA.

The Opposition states that small businesses are substantially burdened by unsolicited fax advertising or "junk faxes."⁸ Advocacy agrees that unsolicited faxes are burdensome, and that Congress intended to address this problem when it passed the Telephone Consumer Protection Act of 1991, resulting in the rules passed by the FCC nearly ten years ago making such faxes illegal.

Advocacy's Petition did not support or address "junk faxes." In our outreach, small businesses advised Advocacy that there are generally two broad types of unsolicited faxes potentially covered by the Fax Advertising Provisions: unwanted junk faxes and faxes that arise from an on going business relationship. Advocacy's concern is that small businesses and membership organizations would now have additional regulatory requirements when faxing to business partners and customers. The Established Business Relationship ("EBR") exemption is crucial to many small businesses. By eliminating the EBR, the Commission is changing how small businesses communicate with each other and their customers, and how membership organizations communicate with their members. The junk faxes to which the Opposition is referring are not covered by the EBR and therefore, are beyond the scope of Advocacy's

⁷ *Petition for Reconsideration* of the Office of Advocacy, U.S. Small Business Administration in CG 02-278 (August 25, 2003).

⁸ Opposition at 2.

Petition.

The Opposition asserts that small businesses would not be burdened by the rule. The Opposition further claims that very few businesses engage in advertising via fax and that e-mail and Web postings are viable alternatives.⁹ Through our outreach and conversations with small businesses and their trade associations, Advocacy was advised that there are many classes of small businesses that rely upon faxing, such as travel agents, realtors, wholesalers, and others. YP.net, a small business Internet yellow pages publisher (with 23 employees), stated that they would have to gather permissions from 18 million businesses that are listed on their database.¹⁰

In addition, not all small businesses are connected to the Internet and even fewer have Web pages. According to our research, 83.2 percent of home-based businesses have access to the Internet in 2000.¹¹ However, that number drops noticeably when applied to all small businesses. According to a poll conducted by the National Federation of Independent Business (NFIB), only 57 percent of all small businesses had access to the Internet in 2001 and 35 percent of all small businesses had a Web page in 2001.¹² When considering the burden of this rule, Advocacy looked at its impact on all classes of small business.

The Opposition criticizes Advocacy for not balancing the burden of the rule with its benefits to small businesses.¹³ Advocacy's Petition is based on our analysis of the FCC's FRFA. Under the RFA, the FCC must identify and analyze the burdens of the rule on the small entities and develop less burdensome alternatives where appropriate. The Commission's FRFA did not include the required impact analysis or alternatives. While the FRFA can include beneficial

⁹ *Id.* at 5.

¹⁰ *Comments in Support of Petitions for Reconsideration* of YP.Net in CG 02-278 (October 13, 2003).

¹¹ Office of Advocacy, U.S. Small Business Administration, *Self-Employment and Computer Usage* (2003).

¹² National Federation of Independent Business (NFIB), *The Use and Value of Web Sites*, National Small Business Poll, Vol. 1, Issue 2 (2001).

impacts, it is not a cost-benefit analysis. Generally, the Commission considers the benefits to small business as part of its justification for the rule, but this does not remove the obligation to perform an adequate FRFA.

The Opposition is critical of Advocacy's Petition for not having specific estimates of the expected costs of compliance with the Fax Advertising Provisions.¹⁴ As discussed previously, this is the type of information that the FCC should have provided as part of its FRFA. This deficiency is one of the main points that Advocacy made in its Petition. This is the type of information the FCC could have obtained had the proposed rule and initial regulatory impact analysis better flushed out these potential compliance requirements and solicited information on cost impacts. The FCC could also have solicited this information through outreach to small entities under Section 609(a) of the RFA. During Advocacy's ex parte meeting with the FCC, Advocacy offered its assistance to the FCC in their efforts to obtain impact information, and Advocacy is currently working to quantify the economic impacts and compliance costs of the Fax Advertising Provisions.

The Opposition objects to Advocacy's request the Commission clarify the definition of "advertisement" and recommends that the FCC and courts make this determination on a case-by-case basis.¹⁵ The Opposition also states that the Fax Advertising Provisions do not affect non-profit organizations.¹⁶ However, there is widespread concern within the trade association community that the FCC may consider faxes that advertise conferences for educational purposes as being "commercial" and therefore, prohibited by this rule. That is exactly the type of clarification Advocacy is seeking. By removing ambiguity, small businesses and small

¹³ *Id.* at 4.

¹⁴ *Id.* at 6.

¹⁵ *Id.*

membership organizations will have a more clear understanding of what behavior the rule permits and prohibits. Advocacy believes regulatory certainty is in the public interest and is beneficial to small businesses. To leave the definition of what is or is not an advertisement to the courts could lead to differing interpretations and leaves those seeking to comply with the rule exposed unnecessarily to potential litigation. The Commission should take every opportunity to define upfront the type of faxes it intends to regulate. Advocacy encourages the FCC to adopt specific language that gives guidance to small businesses and small organizations, and to prepare a small entity compliance guide, as required under the Small Business Regulatory Enforcement Fairness Act,¹⁷ to explain in plain English what is required to comply with the rule to the millions of small entities covered by it.

The Opposition further asserts that membership organizations often use other forms of communication than faxes and that members and contributors do not expect to receive fax communications from the organizations to which they belong or contribute. While this may be Mr. Oney's experience or expectation, Advocacy was told by many membership organizations that they used faxes to communicate with their members. Whether or not the rule applies to tax exempt membership organizations revolves around the definition of an unsolicited advertisement, which is why Advocacy asked the FCC to clarify this definition.

¹⁶ *Id.*

¹⁷ Pub. L. No. 104-121, 110 Stat. 857, § 212 (1996).

Thank you for your consideration of these matters, and please do not hesitate to contact me or Eric Menge of my staff at (202) 205-6533 or eric.menge@sba.gov if you have questions, comments, or concerns.

Respectfully Submitted

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October 30, 2003

Certificate of Service

I, Eric E. Menge, an attorney with the Office of Advocacy, U.S. Small Business Administration, certify that I have, on this October 30, 2003, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Response to the Opposition of the Petition for Reconsideration to the following:

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